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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

STACEY BOUCHER-MERRITT, Plaintiff and Appellant, v. GARRETT DEVORE et al. Defendants and Respondents.	B220272 (Los Angeles County Super. Ct. No. BC411822)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith C. Chirlin, Judge. Reversed and remanded.

The Rossbacher Firm, Henry H. Rossbacher, James S. Cahill and Talin Khachaturian Tenley for Plaintiff and Appellant.

Gordon & Rees, Fletcher C. Alford, Douglas A. Scullion and Mimi M. Glumac for Defendants and Respondents.

Stacey Boucher-Merritt appeals from the trial court's determination that it lacked personal jurisdiction over Defendants Garrett Devore, Garrett Devore Labs, Inc. and Dallin Bruun. We reverse and remand.

FACTS

On or about November 9, 2007, Boucher-Merrit, a California resident, purchased a bottle of Lipovox through eBay. Lipovox is a nutritional supplement sold and marketed by Defendants as a weight loss, anti-aging and anti-acne product. In 2008, Boucher-Merritt sent a cease and desist letter to Defendants asserting that their advertising practices were misleading and in violation of the Consumers Legal Remedies Act (CLRA). (Civ. Code, § 1750 et seq.)

When she received no answer, Boucher-Merritt filed a class action lawsuit against Defendants on April 14, 2009. The matter was brought on behalf of all California residents who purchased Lipovox. Boucher-Merritt alleged that Defendants' claims for Lipovox were "false and misleading and [] reasonably likely to deceive the public. There is no credible scientific evidence that Lipovox or its ingredients (individually or in combination) have any effect on the human bodily functions as listed."

Contending they never conducted any activities in California that amounted to minimum contacts, Defendants moved to quash for lack of jurisdiction. In support, Defendants submitted declarations that stated:

- Devore and Bruun are life-long residents of Utah and had never lived in California. Nor did either of them own real property in California or make any business-related trips to California in connection with the sale of Lipovox.

- Devore Labs was incorporated in Utah and maintains its principal place of business there. Lipovox is manufactured, warehoused, sold, shipped and distributed exclusively from Utah.

- Defendants have never entered into any contracts or agreements in any way related to Lipovox that were executed, required performance or created any continuing obligations in California. The only agreements Defendants have entered into are user agreements for the sale of Lipovox on eBay and an advertising

agreement with Google, both of which were entered into via internet websites and executed by Defendants in Utah. Lipovox is marketed exclusively over the internet and sold through eBay and Google.

- Defendants do not maintain any bank accounts or other financial interests in California.

- Any customers who are dissatisfied with Lipovox are free to return it for a full refund and can send the product back to Defendants' address in Utah.

- Defendants have never conducted any advertising for Lipovox that is directed specifically or uniquely at California.

- Purchases of Lipovox by California residents amount to approximately 11 percent of the Company's overall business revenue.

The trial court granted Defendants' motion, quashing service of the summons and dismissing the complaint. It further denied Boucher-Merrit's request to conduct discovery on jurisdiction on the ground that it was untimely. Boucher-Merrit appealed.

DISCUSSION

I. The Trial Court Erred in Finding Jurisdiction Was Lacking

California courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ. Proc., § 410.10.) The United States Constitution permits a state to exercise jurisdiction over a nonresident defendant if the defendant has sufficient "minimum contacts" with the forum such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' [Citations.]" (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.) "The 'substantial connection,' [citations], between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. [Citations.]" (*Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112, italics omitted (*Asahi*).) Under the minimum contacts test, personal jurisdiction may be general or specific.

(*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445 (*Vons*).) General jurisdiction over a nonresident defendant exists where the defendant's contacts in the forum state are so substantial, continuous and systematic that "they take the place of physical presence in the forum as a basis for jurisdiction." (*Id.* at p. 446.) On the other hand, a defendant is subject to specific jurisdiction if he has purposefully availed himself of forum benefits and the " 'controversy is related to or "arises out of" a defendant's contacts with the forum.' " (*Ibid*.)

When a nonresident defendant challenges personal jurisdiction, the plaintiff "has the initial burden of demonstrating facts justifying the exercise of jurisdiction." (*Vons, supra*, 14 Cal.4th at p. 449.) "If the plaintiff meets this initial burden, then the defendant has the burden of demonstrating 'that the exercise of jurisdiction would be unreasonable.' " (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 273.) Although the parties dispute each other's characterization of the facts, there appears to be no material conflict in the evidence itself and our standard of review is de novo. (*Vons, supra*, 14 Cal.4th at p. 449; *Great-West Life Assurance Co. v. Guarantee Co. of North America* (1988) 205 Cal.App.3d 199, 204.)

A. General Jurisdiction

While Boucher-Merritt contends general jurisdiction exists in this case, there is no authority to support the conclusion that Defendants are subject to general jurisdiction simply because 11 percent of their business revenue is derived from California residents and they use two California companies to advertise and process their orders. Without more, we cannot find as a matter of law that Defendants can be brought before a California court no matter the subject of the controversy. The more difficult question is whether Defendants' conduct in California is sufficient to subject them to specific jurisdiction.

B. Specific Jurisdiction

To determine whether a court may exercise specific jurisdiction over a nonresident defendant, we consider whether: (1) "the defendant has purposefully availed himself or herself of forum benefits;" (2) "the " 'controversy is related to or "arises out of" [the] defendant's contacts with the forum;' " and (3) " 'the assertion of personal jurisdiction would comport with "fair play and substantial justice." ' " (*Vons, supra,* 14 Cal.4th at pp. 446-447.) We address each of these factors in turn.

1. Purposeful Availment

In *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1063 (*Snowney*), the California Supreme Court relied on the sliding scale analysis found in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* (W.D.Pa. 1997) 952 F.Supp. 1119 (*Zippo*) to determine whether there were sufficient facts to establish purposeful availment. The *Zippo* court explained, "At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. [Citation.] At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. [Citation.] The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." (*Zippo*, *supra*, at p. 1124.)

The *Snowney* court noted that interactive websites which sell goods or services, such as the one in question, fall within the middle ground of the *Zippo* sliding scale. The court further observed that some courts have held that sufficient minimum contacts are established simply "where the defendant's website is capable of accepting and does accept purchase orders from residents of the forum state. [Citation.]" (*Snowney, supra*,

at p. 1064.) Other courts require "something more," such as conduct purposefully directed at residents of the forum state. (*Ibid.*) Because purposeful availment was established under either measure in *Snowney,* the court left open the proper approach to be applied in California. We have found no cases since *Snowney,* and the parties have not directed us to any, that resolve this issue. Accordingly, we look to analogous case law which may guide our decision.

The leading case addressing jurisdiction over a foreign corporation in California is *Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893 (*Buckeye*). In *Buckeye,* a California plaintiff was injured by a pressure tank manufactured by Buckeye, an Ohio corporation. (*Id.* at p. 896.) Buckeye did not advertise its products; it had no office, representative, merchandise, property or bank accounts in California; and it did not directly sell its products to anyone in California. Instead, it sold its products through independent manufacturers' representatives in other states. Its only contact with California was the sale of pressure tanks to another Ohio corporation, which maintained a plant in California and used Buckeye's tanks to make hydraulic lifts. (*Id.* at p. 897.) Buckeye sold $25,000 to $30,000 worth of goods per year to California through the Ohio corporation. The court held this was sufficient to permit California to take jurisdiction because the sales to California were not "so fortuitous or unforeseeable as to negative the existence of an intent on the manufacturer's part to bring about this result." (*Id.* at p. 902.) As a result of its sales to California, Buckeye was "purposefully engaged" in economic activity in California as a matter of " 'commercial actuality,' " and the interests of both the plaintiff and the state outweighed any inconvenience to Buckeye. (*Ibid*.)

The opposite conclusion was reached in *Shisler v. Sanfer Sports Cars, Inc.* (2006) 146 Cal.App.4th 1254. There, the plaintiff bought a car advertised on the Florida defendant's website. The plaintiff wrote to and telephoned the defendant about the vehicle and the contract for sale was prepared in Florida and mailed to California. Title to the car passed to plaintiff when the shipper took possession of the car in Florida. (*Id.* at pp. 1257-1258.) The defendant's only physical place of business was in Florida and it mainly sold to Florida residents. The company never owned or leased property in

California, had never directly advertised in the state and had never targeted any California resident as a potential customer. Over the course of 32 years in business, defendant sold fewer than 10 of its 44,800 vehicles to California residents. (*Ibid.*) The court held that the evidence failed to establish purposeful availment as there was no evidence files were exchanged or that any business was actually conducted via the website. "Thus, defendant's maintenance of the Web site alone is insufficient to establish personal jurisdiction." (*Id.* at pp. 1261-1262.)

The Ninth Circuit analyzes specific jurisdiction under a similar three-prong test but has clarified that "purposeful availment" is often used by courts to include both purposeful availment (typically applied to contract actions in which the defendant does business in the forum state) and purposeful direction (typically applied to tort actions in which the defendant directs its actions to the forum state from a different state). (*Schwarzenegger v. Fred Martin Motor Co.* (9th Cir. 2004) 374 F.3d 797, 802.)

In applying the purposeful availment/direction test, federal courts have found that internet sales to residents of the forum state are sufficient evidence of the purposeful availment prong. (*Stomp, Inc. v. Neato, LLC* (C.D.Cal. 1999) 61 F.Supp.2d 1074 [minimum contacts established even though the actual number of sales to California residents may be small]; *Starlight Int'l, LTD. v. Lifeguard Health, LLC* (N.D.Cal. July 22, 2008, No. C 08-1894) 2008 U.S.Dist. Lexis 58927, at pp. 13-14 [sales to California residents of $6,829 or .6 percent]; *Salu, Inc. v. Original Skin Store* (E.D.Cal. Aug. 13, 2008, No. S-08-1035) 2008 U.S.Dist. Lexis 73225, at pp. 11-12 [annual sales to California customers of $ 6,950 or 14 percent of its total business].)

With these cases in mind, we turn to the present dispute and conclude that Defendants have purposefully availed themselves of forum benefits. Under *Zippo*, endorsed by the California Supreme Court, the websites through which Defendants sell Lipovox occupy the middle ground of the sliding scale analysis—that is, they are interactive websites with which a user exchanges information. We are then directed by *Zippo* to examine the level of interactivity and commercial nature of the exchange of information. As we have seen, courts have concluded that a company's use of an

interactive website may constitute purposeful availment of a forum where evidence shows that sales have been made to residents of the forum state, even if the amount of sales is small. (*See, e.g.*, *Starlight Int'l, LTD. v. Lifeguard Health, LLC, supra*, 2008 U.S. Dist. Lexis 58927 at pp. 13-14; *Salu, Inc. v. Original Skin Store*, *supra*, 2008 U.S. Dist. Lexis 73225 at pp. 11-12.)

These federal court decisions comport with the holding in *Buckeye*, where the California Supreme Court found that the amount of goods sold and used in California was not "so fortuitous or unforeseeable" as to negate a finding that Buckeye was purposefully engaged in economic activity in California. (*Buckeye, supra*, 71 Cal.2d at p. 902.) Similarly, the U.S. Supreme Court has held that "the 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, [citations], or of the 'unilateral activity of another party or a third person,' [citation]." (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 475, fn. omitted (*Burger King*).) Our reasoning is further supported by Code of Civil Procedure section 410.10, which "manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations." (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445.)

It is undisputed that Defendants' annual sales to California residents amount to 11 percent of their total business revenue. This annual sales figure shows that Defendants regularly sell their product to California residents and it demonstrates the type of "commercial actuality" from which the *Buckeye* court derived jurisdiction. Like *Buckeye, w*e find that Defendants' sale of Lipovox to California residents is not so random, fortuitous or unforeseen such that Defendants cannot be said to have purposefully availed themselves of doing business in California. Unlike in *Shisler v. Sanfer Sports Cars, Inc.*, *supra,* 146 Cal.App.4th at page 1254, Defendants do not merely advertise Lipovox on their website. Instead, Lipovox may be purchased on the Lipovox.com Web site as well as other interactive websites.

Defendants argue that their California sales do not constitute purposeful availment, since they do not target or market to California consumers in particular. Rather, Lipovox is marketed and sold through websites which are "available to any internet user anywhere in the world." Defendants warn that "any company with an internet website capable of accepting orders for products or services would be subject to suit in any jurisdiction, anywhere in the world. The constitutional limits on personal jurisdiction would be lost entirely." Defendants overstate the threat to internet retailers.

We do not hold that any interactive website that merely has the capacity to sell a product or service to a California resident is subject to jurisdiction in California. Instead, we require "something more." We find that a company is subject to jurisdiction in California if it operates an interactive website whose actual sales to California residents are not random, fortuitous or unforeseeable. Just as it would be unfair to subject a company which sells products over the internet to worldwide jurisdiction because everyone has access to its website, it would be equally unfair to limit jurisdiction over that same company to its home forum simply because its website targets everyone in the world and no one in particular.

2. Controversy Arises from Defendants' Contacts

We now consider whether the controversy arises out of Defendants' contacts with California. (*See Pavlovich v. Superior Court, supra,* 29 Cal.4th at p. 269.) In applying this "relatedness" prong of the test for specific jurisdiction, the California Supreme Court has adopted a "substantial connection" test in which the relatedness requirement is satisfied if "there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." (*Vons, supra,* 14 Cal.4th at p. 456; accord *Snowney, supra,* 35 Cal.4th at p. 1068.) The court specifically declined to apply a " 'but for' " test of relatedness, which simply "asks 'whether the injury would have occurred "but for" the forum contacts.' [Citation.]" (*Snowney, supra,* 35 Cal.4th at p. 1068 & fn. 8.) The court also rejected a "proximate cause" test of relatedness, which "asks whether 'the alleged injury was proximately caused by the contacts in the forum state.' [Citation.]" (*Id.* at p. 1068 & fn. 7.)

The Supreme Court's analysis in *Snowney* is instructive on this point. There, the plaintiff's causes of action arose from allegations that the defendant hotels had failed to notify their customers of an energy surcharge when they made a reservation. (*Snowney, supra,* 35 Cal.4th at pp. 1068-1069.) Specifically, the "plaintiff's causes of action are premised on alleged omissions during defendants' consummation of transactions with California residents and in their California advertisements." (*Ibid*.) Because the alleged harm related directly to the content of the hotels' promotional activities in California, there was an "inherent relationship between plaintiff's claims and defendants' contacts with California . . . ." (*Id*. at p. 1069.) The court found that "the injury allegedly suffered by plaintiff in this case relates *directly* to the content of the defendants' advertising in California." (*Id.* at p. 1070.)

Boucher-Merritt's causes of action are premised on misrepresentations contained in Defendant's website about the benefits of Lipovox. Thus, Boucher-Merritt's claims are directly related to the contacts Defendants have with California. We find the relatedness prong is satisfied. (*Snowney*, *supra*, 35 Cal.4th at p. 1068.)

3. Fair Play and Substantial Justice

Having concluded that the requisite minimum contacts have been established, we must now consider whether the assertion of personal jurisdiction over Defendants would comport with notions of fair play and substantial justice. (*Vons, supra,* 14 Cal.4th at p. 476.) To do so, we consider (1) the burden on the defendant of defending an action in the forum, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining relief, (4) " 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' " and (5) the states' or nations' shared interest " 'in furthering fundamental substantive social policies.' " (*Asahi, supra,* 480 U.S. at p. 113.) "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. [Citations.] On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a

compelling case that the presence of some other considerations would render jurisdiction unreasonable." (*Burger King, supra*, 471 U.S. at p. 477.)

Defendants contend it would be extremely burdensome to require them to defend the action in California because their "witnesses, business records, and other evidence is in Utah." They also argue that "requiring Bruun and Devore, two Utah residents, to litigate in California is particularly unreasonable given their significant familial and professional obligations in Utah and the hardships they would experience defending a case here." In support of this contention, Bruun's declaration explains that his wife is studying to be a nurse and he takes care of their young children while "she attends [school] (15 hrs/week), studies (10 hrs/week) and takes exams (3 hrs/week)." Similarly, Devore states that he also has young children and his wife "is furthering her web-design skills Mon-Thur[s], and [he is] responsible for [their] two children during that time." Defendants present no other reasons to support their argument that it would be unfair or unreasonable to subject them to jurisdiction here.

Defendants acknowledge that any inconvenience suffered by either party may be alleviated with the advances in transportation and telecommunications. Defendants also do not dispute that evidence of harm, if any, would reside with the plaintiffs in California. Moreover, California has a strong interest in protecting its residents from false and fraudulent advertising. As the high court explained in *Burger King, supra*, 471 U.S. 462, "A state generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (*Id*. at p. 474.) While we sympathize with Bruun and Devore's duties to their families, we do not see how theirs is an exceptional case that outweighs the plaintiff's and the State's interest. Defendants have failed to present such a "compelling" case as to render jurisdiction unreasonable in this case.

II. Continuance

Boucher-Merritt contends the trial court erred in denying her request for a continuance to conduct discovery to obtain evidence supporting jurisdiction over defendant. Having determined that specific jurisdiction exists, we need not address this issue.

DISPOSITION

The judgment of dismissal is reversed and the case is remanded to the trial court for further proceedings. Boucher-Merritt is awarded her costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.